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The Problem of the Drinking Driver

by Roger C. Cramton

THE NATION'S highways are crowded with the visible products of man's urge to move people and goods efficiently over this vast continent. The motor vehicle is the shiny embodiment of values and desires that are reshaping the landscape, reordering our lives and providing us with new problems as well as new pleasures. The most dramatic of these new problems is the social and economic loss that seems to be the inevitable concomitant of our present use of the automobile.

Highway accidents in the United States now reap an annual toll of more than 50,000 lives, more than 2,000,000 disabling personal injuries and a staggering economic cost estimated at \$8 to \$10 billion each year. This carnage and the human agony that is associated with it are not fully expressed even in these grim figures. More than anything else, highway accidents are a source of untimely deaths and injury, cutting down young and productive members of the community with a mindless irrationality that resembles the madness of a game of Russian roulette in which everyone in society is entered.

While 95,000,000 Americans are operating motor vehicles on the public highways, creating a control and enforcement problem almost unprecedented in scope, some 70,000,000 Americans are consuming alcoholic beverages on a regular basis. Although

Everyone talks about the drinking driver, and everyone thinks he knows what to do about him. But, Professor Cramton says, the scientifically reliable knowledge we now are acquiring indicates that our legal approaches of deterrence and punishment fail to strike at the heart of the problem and are ineffective. He offers some suggestions for a new course.

much drinking behavior takes place in the drinker's home in the quiet of the evening, much is done at public establishments or private functions from which the drinker departs by private car.

Is the consumption of alcohol by drivers causally related to our traffic fatalities and injuries? Is the drinking driver a problem? Can he be controlled? Although efforts to reduce the frequency and the severity of highway accidents should explore all possible avenues (improving vehicle performance and protection, improving roadway and other environmental conditions, etc.), the role of the drinking driver needs to be documented and dealt with.

The Alcohol Hazard: What Is It?

Does alcohol impair driving ability? Does the consumption of alcohol by drivers and pedestrians contribute to the frequency or the severity of highway accidents? By whom and under what circumstances?

Impairment of driving ability.

Ethyl alcohol, that marvelous substance that has played such an important role in human history, religion and culture, has a two-pronged effect on the human species. The effect on the body is important and well known: alcohol causes a steady deterioration of sensory, perceptual, psychomotor and mental functions. But the effect on the human mind and personality is perhaps even more significant. An impairment of judgment and perception and a loss of emotional restraint characterize the alcohol user. The combination of these two effects has dramatic results—overestimation of capacity to carry out physical and mental tasks and underestimation of mistakes made during their performance. The complex skills involved in the operation of a motor vehicle are particularly vulnerable when this occurs.

A test of experienced bus drivers in maneuvering a bus through narrow gaps is illustrative. After consuming modest amounts of alcohol (two to six ounces of 80-proof whiskey), the bus drivers needed a wider gap to get through safely and regularly attempted gaps much narrower than the bus. The

number of errors of both kinds increased markedly with continuing consumption of alcohol. The effect on the drivers' perception and judgment was even more pronounced than that on physical co-ordination. Drivers attempted gaps that, when sober, they would not think of trying.

It is now well established that alcohol impairs driving ability and that the extent of impairment is related to the amount consumed.

Blood alcohol levels and accident frequency. There is increasing evidence that the occurrence of accidents and their severity are directly related to the consumption of alcohol by drivers. Blood tests performed on fatally injured drivers have produced some shocking statistics: 60-75 per cent of fatally injured drivers have blood alcohol level concentrations of .05 per cent or more by weight of alcohol; 40-50 per cent of fatally injured drivers attain concentrations of .15 or more. The significance of these statements may be underlined when the reader is told that for a 155-pound man to reach a blood alcohol level of .15, he must consume at least ten ounces of 80-proof whiskey in an hour.

Data on nonfatal accidents are not as impressive but are along the same lines.

Of course, alcohol cannot be labeled a contributing factor if drinking were found to the same extent in the normal, nonaccident population exposed to the same driving risks. Accumulating evidence indicates that the incidence of drinking, as one would expect, is much less frequent in the nonaccident group. Less than 10 per cent of nonaccident drivers found on the highways at the same time, place and exposure of those drivers who were involved in accidents have significant blood alcohol levels. And high blood alcohol concentrations, those over .15, are extremely rare among nonaccident drivers but not among accident drivers. These comparisons of blood level concentrations of drivers involved in accidents with those not involved in accidents provide strong evidence that the risk of accident involvement increases as blood level concentration increases.

A comprehensive study in Grand

Rapids, Michigan, several years ago, conducted by Professor Borkenstein of Indiana University, indicates that impairment of driving ability becomes detectable in accident rates at .05 per cent. A driver with a blood alcohol concentration of .06 per cent is twice as likely to be involved in an accident as a sober driver. When the concentration is increased to .10, the driver is six times as likely to be involved in an accident. At .15 or more, the accident involvement risk multiplies by twenty-five.

Drinking by drivers (other than modest social drinking) is a major contributing factor to highway accidents. The scientific basis for this conclusion is as well established as that holding cigarettes to have an adverse effect on health. The argument in both cases is only: first, how great the effect is; second, what kind of drinking (or smoking) behavior is involved; and third, what to do about it.

Social drinkers or alcoholics?

Until recently it has been assumed that since the majority of persons who use alcohol are "social drinkers", most of the accidents in which alcohol is a factor involve driving after social drinking. A pamphlet widely distributed by the insurance industry, for example, states: "As far as safety is concerned the real highway delinquent appears to be the so-called social drinker."

The assumption that the social drinker is the real peril rests on arguments that alcoholics are much fewer in number, that they are more successful in masking their drinking or have a greater tolerance for alcohol and that alcoholics don't drive after drinking. The conclusion to which these assumptions (themselves questionable) are thought to point now is seriously questioned. A number of responsible investigators assert that pathological drinking accounts for a major part of alcohol-involved accidents.

Data supporting the argument that the alcoholic or problem drinker is the real menace are of two kinds: First, there is a high incidence of extremely heavy drinkers among those involved in accidents. Studies indicate that few social drinkers attain blood alcohol levels of the kind (more than .15) so

frequently found in serious and fatal accidents. And second, alcoholics when studied separately have extremely high accident rates. Alcoholics have more accidents than nonalcoholics, however, only when intoxicated; when sober, alcoholics have the same accident rate as the rest of the population.

The dispute over whether social drinkers or alcoholics are the major problem cannot be resolved on existing data, but it is likely that various classes of drinkers make a substantial contribution to the drinking-driving problem. It is clear that the problem drinker plays an important role, and this has major implications for the design of a system of control.

There is a vital need for more precise information concerning the relative contribution to drinking-driving of various groups of drinkers. The Highway Safety Research Institute of the University of Michigan, supported by a substantial federal grant, is engaged actively in tracking down this question. This information is needed for designing effective methods of control, since programs that may work with social drinkers may well be totally ineffective with pathological drinkers. Enough is known now to cast doubt on the simple dichotomy between social drinkers and alcoholics. A more sophisticated classification of drinkers, involving the reasons people drink and the setting in which they drink, is needed. The social context of drinking, the social class of the drinker, the pathological or nonpathological character of the drinking behavior and its interplay with the individual's personality are factors that need to be taken into account.

Effectiveness of Existing Programs

The punitive approach. Current measures to control the drinking driver rely primarily on punishment of drivers who are detected operating vehicles after excessive consumption of alcohol. Although safety slogans speak in terms of a total separation of driving and drinking ("If you drink, don't drive"), existing laws do not attempt the impossible. Most drivers occasionally indulge, and, if the truth be known, most of these social drinkers drive home from parties and other functions at

which alcoholic beverages are served.

The statutory pattern in Michigan is fairly typical of American states. Two criminal statutes deal with driving after drinking. One makes it a misdemeanor to drive under the influence of intoxicating liquor. Penalties of up to ninety days imprisonment or \$100 fine, or both, are prescribed for a first offense. Much steeper penalties, including a felony charge for a third offense, are included. In addition, a conviction for driving under the influence of intoxicating liquor carries a mandatory suspension of the driver's license for a minimum of ninety days. Statutory presumptions phrased in terms of blood level concentration are to the effect that less than .05 per cent of alcohol in the blood gives rise to a presumption of not being under the influence; no presumption attaches when a chemical test shows a blood level of .05-.10; and a driver is presumed under the influence at .15 and over.

The second statute makes it a misdemeanor when "due to consumption of intoxicating liquor, [the driver] has visibly impaired his ability to operate the vehicle". The statutory presumption of "impairment" is at the lower level of .10 or over, but the penalties, except for mandatory license revocation, are much the same as for the first offense. The major difference, in addition to the lower statutory presumptions of impairment, is in the effect on the driver's operating privileges. No mandatory license suspension results from an impairment conviction; the only licensing consequence is the assessment of four points on the driver's record.

Enforcement officials believe that the keystones to effective control of drinking-driving are: first, an implied consent law under which the accused must submit to a chemical test or lose his driver's license, and second, the establishment of objective blood alcohol concentrations that define intoxication regardless of the availability of evidence on the accused's behavior. A growing number of American states satisfy the first criterion, and the second is virtually universal.

Effectiveness of the punitive approach. The punitive approach, involving successive stages of detection,

prosecution, conviction and penalization, has many problems, and its effectiveness, at least with some classes of drinkers, is highly doubtful. There are no rewards or inducements built into the system, which relies almost exclusively on the negative approach of punishment. A failure at any of the four stages results in a failure to deal effectively with a violator.

Effective deterrence because of fear of punishment depends on a number of prerequisites: first, knowledge and understanding of the legal requirements on the part of the public; second, widespread agreement with the underlying premises and values of the legal requirement; third, a belief on the part of the affected public that detection and punishment will follow violation; and fourth, the ability of the citizen to make a rational and conscious choice to avoid the unpleasant consequence (i.e., punishment) by not indulging in the prohibited behavior. There are problems at each step insofar as driving and drinking are concerned.

(1) *Knowledge of legal requirement.* The existence of laws prohibiting driving while intoxicated probably is known to most of the populace. But what constitutes "intoxication", "impairment" or "influence"? Public understanding of the circumstances and amounts in which alcohol may be safely consumed is woefully lacking. The effects of alcohol on the user enhance this problem, since the drinker minimizes his impairment and exaggerates his capacity: "The other fellow can't hold his liquor, but I can!"

Understanding of the legal requirement is complicated by the fact that the consequence we are worried about (a highway accident) is distinct from the act that the law prohibits (driving under the influence). To violate the law, the driver does not need a conscious intent to harm others nor the occurrence of any harm. All that is needed is a degree of impairment that meets statutory requirements that are framed in legal and scientific terminology not easily grasped by the layman.

(2) *Acceptance of implicit premises and underlying values.* No law can be effectively enforced in a democracy unless the public shares the values and premises the law embodies. Our experi-



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ment with a more drastic form of liquor control—prohibition—demonstrated that. Of course, there is a widespread agreement that drinking-driving is a problem and that safety is an important value. These values are not viewed in isolation, however, but in relation to conflicting values, such as the individual's desire to use his vehicle as an extension of his personality, or to engage in such pleasurable behavior as partying or drinking. When the balance is struck, these latter values may well be preferred by a large portion of the populace.

It is likely, moreover, that drivers do not assess the risks of driving after drinking nearly as starkly as the experts do. In particular, widespread understanding of the fact that impairment sets in at fairly modest levels of consumption probably is not present. If drivers do not realize this, and if they do not modify their driving behavior after drinking, accidents, as well as drunk driving charges, will result. The tendency of the young American male to believe that the "other fellow" is the problem, and the remote-

ness of death and injury to him, exacerbates the problem.

(3) *Belief that detection and punishment will follow violation.* Effective deterrence requires a belief on the part of those involved that violation stands a good chance of being detected and, once detected, will inevitably lead to punishment. It is on this count that drunk driving, like other traffic offenses, falls far short of the ideal. The main problem is one of the low probability of detection. There is too much human behavior to be effectively watched—thousands of miles of highways, millions of drinking drivers, behavior which must be observed night and day around the clock. The enforcement officials, relatively small in number, employ selective enforcement and periodic campaigns (such as Christmas or holiday drives in major cities), but the odds are in favor of the drinking driver's not being apprehended. In Michigan, for example, 1,500 state police watch 4,800,000 Michigan drivers.

The ubiquitous nature of drinking-driving increases sympathy for those who are caught and pushes police, prosecutors, courts and juries toward a lenient approach. "There but for the grace of God go I" is the common sentiment.

The stringent nature of the penalties adds to this pressure towards leniency. In the abstract the public believes that a drunk driver should have his license taken away from him, but in the concrete individual situation, considering a person who is thought to be like everyone else and who needs a license for work and pleasure, the punitive attitude softens. In fact, the drunk driver may be far different from the ordinary social drinker, but the public does not realize this. The reaction of the ordinary juror is likely to be that "We all live it up once in a while, only he was unfortunate enough to get caught."

(4) *Deterrence assumes a rational or conscious choice.* Finally, deterrence assumes a rational or conscious choice on the part of the affected public. The offender is thought of as a person who knows what is wrong, who deliberately decides to violate and who once caught deserves to be punished. Accumulating evidence that many or most of those

who are caught in the net are alcoholics or problem drinkers, however, casts doubt on the correctness of the deterrent assumption. Addiction may limit alcoholics in the prerequisite of moral responsibility—the ability to make a rational choice. This argument, of course, has considerably less force in the context of drunk driving than in public drunkenness cases, since the alcoholic driver can decide in advance of his compulsive drinking whether his drinking takes place under circumstances that will entail the subsequent use of an automobile.

The combination of all these factors makes it doubtful whether the punitive approach to drunk driving is an effective one.

Driver education and exhortation. Licensing and safety officials seek to exhort and to educate the driver by a variety of means—slogans, educational campaigns and driver improvement interviews. These efforts may have desirable effects on the majority of drivers who want to conform and who fear the loss of driving privileges, but it is doubtful that they have any effect on alcoholics and heavy drinkers. Generalized advice and grisly slogans lack specific content and are not meaningful. To the extent that educational campaigns urge complete separation of drinking and driving, they are unrealistic, and no one pays any attention to them. Nor is the problem drinker cured by an interview with a driver licensing officer, any more than he is by his earlier encounters with other people in the system: police officers, judges and probation officers.

What Are the Possible Countermeasures?

Thus far my theme has been largely a counsel of despair. What hope is there for the future? Are there effective methods of controlling the drinking driver?

More and better enforcement? Enforcement officials tend toward the view that what is needed is more and better enforcement: more traffic police, better detection techniques (such as roaming check lanes and wholesale

breath-testing) and stricter penalties. While I believe that better detection techniques should be explored (including widespread breath-testing), I do not think increased severity will accomplish anything barring a monumental—and unlikely—change in public attitudes. The regulatory control of drinking and driving in the United States is rather lax precisely because the social climate does not favor more stringent controls. Stiffer penalties will merely lead to more difficulty in enforcement. Nor is it likely that the problem drinker will be affected by stepped-up enforcement. What alternatives are available?

More modest penalties? It is arguable that we would do a better job if we combined better detection techniques with more modest penalties. Periodic and random breath-testing of drivers would enhance detection of the drunk driver, and this approach might be acceptable politically and constitutionally if combined with reduced penalties. One possibility would be this: Traffic officers stop and check random samples of drivers on a scientific basis. If a breath test shows a blood level concentration above .08 per cent, the officer takes the driver home in a police car as an unsafe driver. If the driver's car is not a traffic hazard in its present location, it is left there; otherwise, it is impounded. When the driver sobers up the next morning, he faces the inconvenience of getting his car back.

Instances of violation would be reported to driver licensing officials and included on a driver's record. If a driver were caught three or more times, the licensing officials would require him to come in for treatment as a problem drinker under pain of losing his license. The system would operate without criminal penalties. The embarrassment of being driven home in a police car and the inconvenience of getting one's car back would be the exclusive "civil" penalties. Treatment for the problem drinker would be enforced by possible loss of license.

Identify and treat problem drinkers. Whether such a radical measure can be adopted, better identification and treatment of problem drinkers is in order. To what extent is the drinking-driving problem one of

problem drinking? Can the involved groups of alcoholics be identified in advance of fatal or other accidents? Can adequate treatment facilities be established and staffed? These questions desperately need attention, and attempted solutions will need public support.

The probable existence of a large category of alcoholics in the group of drunk drivers encountered by lawyers places a special responsibility on the lawyer to be alert to symptoms of alcoholism in his client. The lawyer should be prepared to counsel him concerning possible treatment and rehabilitation. (Steps along this line may also gain more lenient responses from prosecutors and judges.) An awareness of the treatment facilities in the community is a necessary first step.

Reshape public attitudes. Public attitudes toward the drinking-driving problem need to be reshaped. One needed change is a reduced emphasis on individual moral responsibility where alcohol use is involved, combined with increased attention to the addicted drinker. Another, as already

indicated, is to minimize use of the criminal law and concentrate on civil regulatory approaches with loss of license as the ultimate penalty.

A further step is long overdue. Traffic spokesmen and public officials should stop propagating the myth that the social drinker is the real problem. This appears not only to be untrue, but it restricts effective steps that otherwise might be taken. The constant reiteration of this theme provides alcoholics with a rationalization for their behavior (on the theory that we are all the same—"Everyone does it"), leads to leniency on the part of judges and jurors for the same reasons and fails to give the social drinker the guidance that he really needs. The public needs to be told, convincingly and repeatedly, to drink slowly, to eat when they drink, and to let someone else drive home if they have had more than two stiff drinks within two hours before driving.

Give attention to other factors. Pious observations that drinking drivers are involved in more serious accidents than other drivers are not

enough. Accidents involving drinking drivers will continue to occur in large numbers no matter what we do. But the severity of the consequences can be ameliorated by (1) better packaging of vehicle occupants (vehicle safety standards); (2) better roadway design to reduce head-on collisions and limit the severity of running off the road (two types of accidents in which drinking drivers specialize); and (3) increasing the quality and quantity of emergency medical care. Drinking drivers have most of their accidents at night. The lag between an accident and the availability of medical care, and deficiencies in the speed and quality of emergency medical care when provided, result in many unnecessary casualties each year. We need the same quality of medical care for highway victims that our soldiers get in Vietnam.

Although great improvement in our methods of handling the drinking driver will produce beneficial results, other opportunities for reducing the frequency or severity of highway accidents should not be neglected.

National Institute on Treble Damage Litigation

THE SECTION of Antitrust Law will present its third national institute, "Antitrust Treble Damage Litigation," on November 7 and 8, 1968, at the Regency Hyatt House in Atlanta. Miles W. Kirkpatrick of Philadelphia, chairman of the Section, and Richard W. McLaren of Chicago, the immediate past chairman, will join John Izard of Atlanta, who is a member of the Section's council and chairman of the institute, in serving as moderators for sessions of the institute.

On November 7 two panels of experienced antitrust lawyers will discuss the conduct of an antitrust case from evaluation of the initial claim through

trial. The speakers on the morning panel will be Harold E. Kohn of Philadelphia, Leroy Jeffers of Houston and W. Donald McSweeney of Chicago. The afternoon panel includes Maxwell M. Blecher of San Francisco, Julian O. von Kalinowski of Los Angeles and Thomas M. Scanlon of Indianapolis.

The session on the morning of November 8 will consider the latest significant developments in antitrust law. Panelists are H. Francis DeLone of Philadelphia and Ira M. Millstein and Robert M. Estes of New York City. The institute will adjourn at 12:30 P.M. on November 8.

A highlight of the institute will be

the luncheon on November 7, at which Alfred P. Murrah, Chief Judge of the United States Court of Appeals for the Tenth Circuit, will be the speaker.

The tuition fee, which includes the luncheon, a reception and practice materials, is \$50 for Association members and \$60 for nonmembers. Advance registration may be made by writing the Division of Legal Practice and Education, American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637. Hotel reservations should be made directly with the Regency Hyatt House, Peachtree Center, Atlanta, Georgia, with notification that the requester is attending the institute.